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ABSTRACT

This document is one of six discussion papers prepared for the Wisconsin Legislative Council's Special Committee on Crimes Against Children. The introduction explains the committee's task of conducting a thorough examination of state laws relating to crimes against children, reviewing major policy issues affecting those laws to determine whether substantive changes are needed in various statutory provisions and reorganizing the laws. This paper deals with the problem of physical neglect of children. Part I covers the laws relating to failure to support, part II deals with the prohibition against abandonment of a young child, and part III discusses the prohibition against abuse of children in facilities. For each of these issues, there is a section explaining current law and a section giving suggestions for statutory revisions. Copies of the statutes covered in the report, arranged in numerical order, and a copy of ss. 939.50 to 939.52, which prescribe the basic criminal penalty classification system used in the Criminal Code are appended. (NB)

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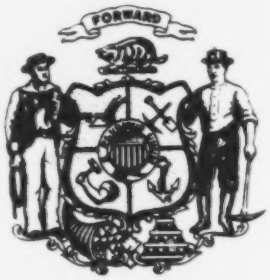


# CRIMES AGAINST CHILDREN
## C. PHYSICAL NEGLECT

DISCUSSION PAPER 86-1C

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Wisconsin Legislative Council Staff — Madison, Wisconsin

Special Committee on Crimes Against Children — September 4, 1986

DISCUSSION PAPER 86-1C*

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# CRIMES AGAINST CHILDREN

## C. PHYSICAL NEGLECT

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## INTRODUCTION

Discussion Paper 86-1C is the third of a series of Discussion Papers that will be prepared for the Legislative Council's Special Committee on Crimes Against Children. The Special Committee is conducting a thorough examination of state laws relating to crimes against children, including:

1. Reviewing major policy issues affecting these laws to determine whether substantive changes are needed in such statutory provisions as abuse of children; sexual assault; child enticement; lewd and lascivious conduct; abduction; incest; abandonment; and others.

2. Reorganizing these laws, to the extent appropriate, so that like provisions are logically grouped; ambiguities and conflicts in the present laws are reconciled; and relevant Supreme Court and Court of Appeals decisions and Attorney General opinions are codified.

The Special Committee review will be based, in part, on a project undertaken, at the request of Senator Barbara Ulichny, by the University of Wisconsin-Madison Law School and Extension. This project resulted in a preliminary draft proposal entitled "Crimes Against Children: A Proposed Chapter of the Wisconsin Statutes" (July 1985), prepared by Attorney Ronni G. Jones, under the supervision of a Law School/Extension faculty advisory committee. The draft proposal (hereafter referred to as the Law School Proposal) suggests certain policy changes in various statutes relating to crimes against children and suggests the creation of a separate chapter of the statutes on crimes against children, organized by "the interest of the child sought to be protected."

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*This Discussion Paper was prepared by Don Salm, Staff Attorney, Legislative Council Staff.

For Special Committee discussion purposes, the issues and statutes to be examined will be grouped into the following separate Discussion Papers which will describe the statutes under discussion and summarize suggestions for changes in these statutes:

Discussion Paper 86-1A: Physical and Psychological Abuse: The Paper will cover ss. 940.201, abuse of children; 940.203, sexual exploitation; and 940.225, sexual assault.

Discussion Paper 86-1B: Sexual Morality: The Paper will cover ss. 944.06, incest; 944.12, enticement for immoral purposes; 944.15 fornication; 944.17, sexual gratification; 944.20 and 944.21, lewd behavior; 944.25, exposure to harmful materials; and 944.32, soliciting prostitutes.

Discussion Paper 86-1C: Physical Neglect: The Paper will cover ss. 940.27, failure to support; 940.28, abandonment of a young child; and 940.29, abuse of residents of facilities.

Discussion Paper 86-1D: Interfering With Custody: The Paper will cover ss. 940.32, abduction; 946.71, interference with custody of child; 946.715, interference by parent with parental rights of other parent; and 946.716, unauthorized placement for adoption.

Discussion Paper 86-1E: Contributing to Delinquency of a Minor: The Paper will cover ss. 947.15, contributing to delinquency; 947.08, crime comics; 125.07, serving alcohol beverages to minor; 161.46, distributing drugs to minor; 943.34, receiving stolen property from minor; and 946.46, encouraging probation or parole violation.

Discussion Paper 86-1F: Regulatory Offenses Directed at Children: The Paper will cover ss. 103.06 to 103.86, employment regulations; 118.13, pupil discrimination; 146.01, infant blindness; 151.03, lead poisoning; 175.20, amusement places; 444.09 (4), boxing exhibitions; 940.26, hazing; 942.02, strip search by school employe; 946.63, concealing death of a child; and 943.35, receiving property from a child.

Discussion Paper 86-1C is organized as follows: Part I covers the laws relating to failure to support; Part II deals with the prohibition against abandonment of a young child; Part III discusses the prohibition against abuse of children in facilities; and the Appendix contains copies of the statutes covered in the Discussion Paper, arranged in numerical order, plus a copy of ss. 939.50 to 939.52, which prescribe the basic criminal penalty classification system used in the Criminal Code.

## PART I

## FAILURE TO SUPPORT

### A. EXPLANATION OF CURRENT LAW

#### 1. Description of Failure to Support Statute

The current failure to support statute, s. 940.27, Stats., was created by 1985 Wisconsin Act 29 (the Budget Act); new s. 940.27 replaced s. 52.05, Stats., relating to abandonment and s. 52.055, Stats., relating to failure to support, both of which were repealed. Subsequently, s. 940.27 was amended by 1985 Wisconsin Act 56 (the Abortion Prevention and Family Responsibility Act of 1985). Under Act 56, s. 940.27 was amended to establish the responsibility of grandparents to provide support of a child of one of their dependent minor children; these provisions apply only until December 31, 1989.

The current law is described below.

##### a. Prohibition; Penalties for Failure to Support

Under s. 940.27, any person who intentionally fails to provide spousal, grandchild or child support which the person knows, or reasonably should know, that he or she is legally obligated to provide is subject to the following penalties:

(i) A Class A misdemeanor (punishable by a fine not to exceed $10,000 or imprisonment not to exceed nine months, or both), if the person intentionally fails to support for less than 120 consecutive days [s. 940.27 (2) and (3), Stats.].

(ii) A Class E felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed two years, or both), if the person intentionally fails to support for 120 or more consecutive days.

In addition to or instead of imposing the above penalties, the court must take one of the following actions:

(i) If a court order exists that requires the defendant to pay child, grandchild or spousal support, the court must order the defendant to pay the amount required, including any amount necessary to meet a past legal obligation for support and, if appropriate, modify that order; or

(ii) If no court order exists, the court must order a support order [s. 940.27 (7) (b), Stats.].

Current law specifies that it is prima facie evidence (i.e., sufficient evidence to establish a given fact) of intentional failure to provide child, grandchild or spousal support:

(i) If a person, who is subject to a court order requiring child, grandchild or spousal support payments, fails to pay any support payment required under the order.

(ii) If a person, who is not subject to a court order requiring child, grandchild or spousal support payments: (a) fails to provide support equal to at least the monthly payment specified for Aid to Families with Dependent Children recipients, under s. 49.19 (11) (a) 1, Stats.; or (b) causes a spouse, grandchild or child to become a dependent person, which is defined, in s. 49.01 (2), Stats. as being without the present available money, income, property or credit sufficient to provide necessary commodities and services such as food, housing, clothing, fuel, light, water and medical care [s. 940.27 (4), Stats.].

b. Defenses

It is not a defense to a charge that there has been a violation of the failure to support statute that the child, grandchild or spousal support is provided wholly or partially by any other person. However, current law does provide that affirmative defenses to a failure to support violation include but are not limited to inability to provide child, grandchild or spousal support. Current law specifies that a person does not demonstrate inability to provide support to a child, grandchild or spouse, if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment or reduces his or her earnings or assets [s. 940.27 (5) and (6), Stats.].

2. Discussion of Relevant Court Decisions and Other Interpretations of the Law

There are no relevant court decisions or other interpretations of s. 940.27.

## B. SUGGESTIONS FOR STATUTORY REVISIONS

### 1. Background

In enacting s. 940.27 in 1985, the Legislature intended to replace the vague, general language in the prior failure to support statutes with concrete, more easily administered provisions (for example, the prohibitions based on the number of days in which a person intentionally fails to pay child support). The following changes suggested by the Law

School Proposal depart from this recently-adopted policy by interjecting more uncertainty in the process of enforcing child support obligations. It appears that the Law School Proposal, which was developed prior to the enactment of s. 940.27 would have the following effect on the new law:

(i) The Proposal would replace the provision in current law prohibiting a person from intentionally not paying child support for less than 120 consecutive days with the undefined period of "not timely paying child support"; and

(ii) The Proposal would create a provision [based on old s. 52.05 (1), 1983 Stats.] prohibiting a person who is responsible for a child's welfare from not providing for necessary and adequate support for the child. The Proposal specifies that the person must have the intent to abandon the child.

Both of these provisions may be unnecessary in light of current s. 940.27 which, in more specific terms, deals with the failure of a parent or other legal custodian to provide adequate child support.

2. Suggestion

The Special Committee could consider:

(i) Making no change in the new law on failure to support.

(ii) Replacing the less than 120-day time limit with a limit of "not timely paying child support."

(iii) Prohibiting a person from not providing necessary and adequate support for a child in his or her care.

[For the specific language suggested in the Law School Proposal, see the following provisions in the Proposal: s. 960.53, Causing a Child to be in Destitute Circumstances; and s. 960.54, Failing to Support a Child.]

## PART II

## ABANDONMENT OF YOUNG CHILD

### A. EXPLANATION OF CURRENT LAW

#### 1. Description of Abandonment of Young Child Statute

Under current law, whoever, with intent to abandon a child, leaves a child under the age of six years in a place where the child may suffer because of neglect is guilty of a Class D felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed five years, or both) [s. 940.28, Stats.].

#### 2. Discussion of Relevant Court Decisions and Other Interpretations of the Law

There are no relevant court decisions or other interpretations of s. 940.28.

### B. SUGGESTIONS FOR STATUTORY REVISIONS

#### 1. Background

Persons who violate the current abandonment statute are subject to the same maximum penalty (i.e., a Class D felony) no matter what degree of potential harm the child is placed in by the act of abandonment. For example, a child left alone in an alley on a frigid winter day is, in general, at much greater risk of death or physical injury than a child left on the doorstep of a house on a nice summer day. However, the statute treats the offense the same.

An example of a statutory response to this issue is contained in the Texas law on child abandonment, which establishes two levels of potential harm to an abandoned child. Under the law, different penalties apply if a person who has custody, care or control of a child under 15 years intentionally abandons a child: (i) "under circumstances that expose a child to an unreasonable risk of harm"; or (ii) "under circumstances which would place the child in imminent danger of death, bodily injury or physical or mental impairment." The former is a Class A misdemeanor (punishable by a fine of not more than $2,000, imprisonment for not more than one year, or both) and the latter is a 3rd degree felony (punishable by a fine of not more than $5,000, imprisonment for not more than 10 years, or both) [s. 22.041, Texas Penal Code].

2. Suggestion

The Special Committee could consider establishing degrees of abandonment based on the harm to which the child is exposed with different penalties for each degree of the offense.

## PART III

## ABUSE OF CHILDREN IN FACILITIES

### A. EXPLANATION OF CURRENT LAW

#### 1. Description of Abuse of Children in Facilities Statute

Persons in charge of or employed in any of eight statutorily-specified facilities, who abuse, neglect or ill-treat any person confined in or a resident of the facility, or who knowingly permit another person to do so, are guilty of a Class E felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed two years, or both). This provision is most likely to affect children who are in the following two facilities set forth in the statutes:

a. A school or institution for the mentally deficient; or

b. An institution operated by a licensed child welfare agency or by a public agency for the care of neglected, dependent or delinquent children [s. 940.29 (4) and (6), Stats.].

#### 2. Discussion of Relevant Court Decisions and Other Interpretations of the Law

There are no relevant court decisions or other interpretations of s. 940.29 (4) and (6).

### B. SUGGESTIONS FOR STATUTORY REVISIONS

#### 1. Background

As discussed in Discussion Paper 86-1A, pages 8 and 9, the Law School Proposal recommends replacing the current criminal child abuse statute [s. 940.201, Stats.] with a series of statutes recognizing various types and degrees of physical and psychological abuse by: (a) intentional or reckless conduct; or (b) the failure of a person in a position of authority to act to prevent harm to a child.

In this context, the Law School Proposal would repeal s. 940.29 (4) and (6), relating to abuse of children in facilities, because that type of harm would be consolidated under the revised child abuse statutes. The result of this consolidation would change the penalty of abuse of children in facilities from the current Class E felony to a Class B, C or D felony,

depending on the type of conduct involved and the degree of injury caused to the child.

2. Suggestion

If the Special Committee adopts the Law School Proposal's recommendation for a series of criminal child abuse statutes, as described in Discussion Paper 86-1A, pages 8 and 9, the Special Committee could consider:

(a) Repealing s. 940.29 (4) and (6) since these acts would be covered by the new child abuse statutes; or

(b) Retaining s. 940.29 (4) and (6) as a separate offense.

[For the specific language in the Law School Proposal, see the following provisions of the Proposal: s. 960.11, Intentionally Causing Bodily Harm to a Child; s. 960.12, Recklessly Causing Bodily Harm to a Child; s. 960.13, Failing to Act; and s. 960.31, Causing Emotional or Mental Harm to a Child.]

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## APPENDIX

## STATUTES DISCUSSED IN DISCUSSION PAPER 86-1C
## (LISTED IN NUMERICAL ORDER)

STATUTES DISCUSSED IN DISCUSSION PAPER 86-1C
(LISTED IN NUMERICAL ORDER)

939.50 CLASSIFICATION OF FELONIES. (1) Except as provided in ss. 946.83 and 946.85, felonies in chs. 939 to 948 are classified as follows:

(a) Class A felony.

(b) Class B felony.

(c) Class C felony.

(d) Class D felony.

(e) Class E felony.

(2) A felony is a Class A, B, C, D or E felony when it is so specified in chs. 939 to 948.

(3) Penalties for felonies are as follows:

(a) For a Class A felony, life imprisonment.

(b) For a Class B felony, imprisonment not to exceed 20 years.

(c) For a Class C felony, a fine not to exceed $10,000 or imprisonment not to exceed 10 years, or both.

(d) For a Class D felony, a fine not to exceed $10,000 or imprisonment not to exceed 5 years, or both.

(e) For a Class E felony, a fine not to exceed $10,000 or imprisonment not to exceed 2 years, or both.

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939.51 CLASSIFICATION OF MISDEMEANORS. (1) Misdemeanors in chs. 939 to 948 are classified as follows:

(a) Class A misdemeanor.

(b) Class B misdemeanor.

(c) Class C misdemeanor.

(2) A misdemeanor is a Class A, B or C misdemeanor when it is so specified in chs. 939 to 948.

(3) Penalties for misdemeanors are as follows:

(a) For a Class A misdemeanor, a fine of not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

(b) For a Class B misdemeanor, a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

(c) For a Class C misdemeanor, a fine not to exceed $500 or imprisonment not to exceed 30 days, or both.

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939.52 CLASSIFICATION OF FORFEITURES. (1) Except as provided in s. 946.85, forfeitures in chs. 939 to 948 are classified as follows:

(a) Class A forfeiture.

(b) Class B forfeiture.

(c) Class C forfeiture.

(d) Class D forfeiture.

(2) A forfeiture is a Class A, B, C or D forfeiture when it is so specified in chs. 939 to 948.

(3) Penalties for forfeitures are as follows:

(a) For a Class A forfeiture, a forfeiture not to exceed $10,000.

(b) For a Class B forfeiture, a forfeiture not to exceed $1,000.

(c) For a Class C forfeiture, a forfeiture not to exceed $500.

(d) For a Class D forfeiture, a forfeiture not to exceed $200.

940.27 FAILURE TO SUPPORT. (1) In this section:

(a) "Child support" means an amount which a person is legally obligated to provide under s. 49.90, 767.25 or 767.51.

(b) 1. "Grandchild support" means an amount which a person is legally obligated to provide under s. 49.90 (1) (a) 2 and (11).

2. Subdivision 1 does not apply after December 31, 1989.

(c) "Spousal support" means an amount which a person is legally obligated to provide under s. 49.90 or 767.26.

(2) Before January 1, 1990, any person who intentionally fails for 120 or more consecutive days to provide spousal, grandchild or child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class E felony.

(2m) After December 31, 1989, any person who intentionally fails for 120 or more consecutive days to provide spousal or child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class E felony.

(3) Before January 1, 1990, any person who intentionally fails for less than 120 consecutive days to provide spousal, grandchild or child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class A misdemeanor.

(3m) After December 31, 1989, any person who intentionally fails for less than 120 consecutive days to provide spousal or child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a Class A misdemeanor.

(4) Before January 1, 1990, under this section, the following is prima facie evidence of intentional failure to provide child, grandchild or spousal support:

(a) Before January 1, 1990, for a person subject to a court order requiring child, grandchild or spousal support payments, failure to pay any child, grandchild or spousal support payment required under the order.

(b) Before January 1, 1990, for a person not subject to a court order requiring child, grandchild or spousal support payments, failure to provide support equal to at least the amount set forth under s. 49.19 (11)

(a) 1 or causing a spouse, grandchild or child to become a dependent person as defined in s. 49.01 (2).

(4m) After December 31, 1989, under this section, the following is prima facie evidence of intentional failure to provide child or spousal support:

(a) After December 31, 1989, for a person subject to a court order requiring child or spousal support payments, failure to pay any child or spousal support payment required under the order.

(b) After December 31, 1989, for a person not subject to a court order requiring child or spousal support payments, failure to provide support equal to at least the amount set forth under s. 49.19 (11) (a) 1 or causing a spouse or child to become a dependent person as defined in s. 49.01 (2).

(5) Before January 1, 1990, under this section, it is not a defense that child, grandchild or spousal support is provided wholly or partially by any other person.

(5m) After December 31, 1989, under this section, it is not a defense that child or spousal support is provided wholly or partially by any other person.

(6) Before January 1, 1990, under this section, affirmative defenses include but are not limited to inability to provide child, grandchild or spousal support. A person may not demonstrate inability to provide child, grandchild or spousal support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment or reduces his or her earnings or assets.

(6m) After December 31, 1989, under this section, affirmative defenses include but are not limited to inability to provide child or spousal support. A person may not demonstrate inability to provide child or spousal support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment or reduces his or her earnings or assets.

(7) (a) Before January 1, 1990, before trial, upon petition by the complainant and notice to the defendant, the court may enter a temporary order requiring payment of child, grandchild or spousal support.

(b) In addition to or instead of imposing a penalty authorized for a Class E felony or a Class A misdemeanor, whichever is appropriate, the court shall:

1. Before January 1, 1990, if a court order requiring the defendant to pay child, grandchild or spousal support exists, order the defendant to pay the amount required including any amount necessary to meet a past legal obligation for support and, if appropriate, modify that order.

2. Before January 1, 1990, if no court order described under subd. 1 exists, enter such an order and do so, for orders for child or spousal support, after considering s. 767.25.

(c) Before January 1, 1990, an order under par. (a) or (b), other than an order for grandchild support, constitutes an income assignment under s. 767.265 and may be enforced under s. 767.30. Any payment ordered under par. (a) or (b), other than a payment for grandchild support, shall be made in the manner provided under s. 767.29.

(7m) (a) After December 31, 1989, before trial, upon petition by the complainant and notice to the defendant, the court may enter a temporary order requiring payment of child or spousal support.

(b) In addition to or instead of imposing a penalty authorized for a Class E felony or a Class A misdemeanor, whichever is appropriate, the court shall:

1. After December 31, 1989, if a court order requiring the defendant to pay child or spousal support exists, order the defendant to pay the amount required including any amount necessary to meet a past legal obligation for support and, if appropriate, modify that order.

2. After December 31, 1989, if no court order described under subd. 1 exists, enter such an order after considering s. 767.25.

(c) After December 31, 1989, an order under par. (a) or (b) constitutes an income assignment under s. 767.265 and may be enforced under s. 767.30. Any payment ordered under par. (a) or (b) shall be made in the manner provided under s. 767.29.

(8) The provisions of any court order requiring payment of grandchild support payments, issued under this section prior to January 1, 1990, do not apply after December 31, 1989.

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940.28 ABANDONMENT OF YOUNG CHILD. Whoever, with intent to abandon the child, leaves any child under the age of 6 years in a place where the child may suffer because of neglect is guilty of a Class D felony.

940.29 ABUSE OF RESIDENTS OF FACILITIES. Any person in charge of or employed in any of the following facilities who abuses, neglects or ill-treats any person confined in or a resident of any such facility or who knowingly permits another person to do so is guilty of a Class E felony:

(1) A penal or correctional institution or other place of confinement; or

(2) A home for the aged; or

(3) A hospital for the mentally ill; or

(4) A school or institution for the mentally deficient; or

(5) A state school for the blind or deaf; or

(6) An institution operated by a licensed child welfare agency or by a public agency for the care of neglected, dependent, or delinquent children; or

(7) A nursing home as defined in s. 50.01 (3).

(8) A community-based residential facility as defined in s. 50.01 (1).